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Supreme Court of the United States

OCTOBER TERM, 1941

[redacted] 28

CLOVERLEAF BUTTER COMPANY, a Corporation,
Petitioner-Appellant,

vs.

HAYGOOD PATTERSON as Commissioner of Agriculture & Industries of the State of Alabama, and GEORGE H. MARSH, as Director of the Division of Agricultural Chemistry in the Department of Agriculture & Industries of the State of Alabama.
Respondents-Appellees.

BRIEF AND ARGUMENT FOR PETITIONER

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Supreme Court of the United States

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CLOVERLEAF BUTTER COMPANY, a Corporation,
Petitioner-Appellant,

vs.

HAYGOOD PATTERSON as Commissioner of Agriculture & Industries of the State of Alabama, and GEORGE H. MARSH, as Director of the Division of Agricultural Chemistry in the Department of Agriculture & Industries of the State of Alabama.

Respondents-Appellees.

BRIEF AND ARGUMENT FOR PETITIONER

STATEMENT OF THE CASE

This case is brought here by certiorari ordered on the 7th day of April, 1941, to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision of that Court made on the 14th day of Dec. 1940, reported 116 F (2) 227 wherein judgment of the District Court of the United States for the Middle District of Alabama dismissing complainant's bill on motion, without a trial on the merits, was affirmed; Circuit Judge Foster dissenting.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code as amended, by Acts of February 13, 1925, Subsections (a) and (b) separately and severally, U. S. C. A., Title 28, Section 347, and also rule 38 of the revised rules of the Supreme Court of the United States adopted February 13, 1939.

Lemke v. Farmers Grain Co., 258 U. S. 50.

Summary Statement of Matter Involved

The original verified bill of complaint filed in the District Court was brought by the Cloverleaf Butter Company, an Alabama corporation engaged in interstate commerce, seeking to enjoin respondent officials and agents of the Department of Agriculture and Industries of the State of Alabama from molesting or interfering with complainant's property and business in interstate commerce. No contention was ever made that the respondents did not have the right to take action in regard to any of complainant's products offered for sale in Alabama; but the relief prayed was to enjoin respondents from invading the field of interstate commerce already preempted and fully occupied by the Federal Government.

Relief prayed in the District Court was denied. Complainant appealed to the Circuit Court of Appeals and decision was rendered affirming the District Court with dissenting opinion by Judge Foster. On appellant's petition for certiorari filed in this Honorable Court the writ was granted on April 7, 1941.

OPINION BELOW

The majority opinion of the Circuit Court of Appeals, 116 F (2d) 227, holds, (1) That although Congress has fully and completely occupied a field in interstate commerce the State may nevertheless take action in the same field *unless expressly excluded* by congressional language or its legal equivalent. (2) That Federal authorities must make compiaint of interference by State officers in a field preempted by Congress before a party whose business is affected may invoke the protection of his rights under the Federal Constitution.

The following excerpts from the majority opinion state the basis of the decision of the Circuit Court of Appeals:

> "We agree with the appellees however, that the district judge was right in denying the relief prayed and dismissing the bill as without merit. For, in our opinion, nothing in the act or regulations under it, *expressly purports to prevent*, or impliedly purports to exclude the state from making and enforcing like regulations with those the United States lays down, for the purity and wholesomeness of ingredients to be used in the process of manufacturing food products in Alabama for sale there and in other states."
>
> * * * * * *
>
> "Here the imagined conflict between state and federal authorities lies only in the fact that the federal authorities have failed to seize and condemn particular lots of butter which the state has found seizable. *There is no complaint on the part*

of the federal authorities of any interference with them by the authorities of the state. It is not claimed that the state is imposing any higher or other standards than the federal government imposes, indeed it is admitted that it is not. The sole claim is that in enforcing these nonconflicting standards the state has actually seized for condemnation, packing stock which United States inspectors have not so seized. The claim in short is, that the fact of its nonseizure by the federal inspectors is in effect, a certificate or finding that the articles are nonseizable and therefore immune for state seizure."

The correct rule is clearly and succintly stated by Circuit Judge Foster in his dissenting opinion in the following words:

"Conceding that the Alabama regulations are practically the same as the Federal regulations I consider that Congress has preempted and completely occupied the field as to the manufacture of processed butter for sale and shipment in interstate commerce. The law of Alabama, enforced by state officers, should not be permitted to interfere with the Federal Statute and regulations in respect to shipments in interstate commerce."

The Case Made By The Bill

Petitioner is an Alabama corporation engaged in business in Alabama under Federal license in the manufacture for sale and the sale of renovated butter. Ninety per cent of petitioner's product is manufactured for sale and sold in interstate commerce. Ten per cent of petitioner's product is sold locally. (R. p. 6.)

Respondents are officers of the Department of Agriculture and Industries of the State of Alabama.

Petitioner has been operating under Federal license and inspection and regulation for about twenty years without any effort on the part of the respondents to inspect its raw material or finished product in interstate commerce. (R. p. 2,)

Without any change in the statute or regulations of the state, in recent years the respondents suddenly began to stop trucks moving in interstate commerce from Georgia to Alabama loaded with country butter in route to petitioner's plant in Birmingham for processing and sale in interstate commerce, and to seize said butter before its interstate journey was at an end by delivery to petitioner's plant in Birmingham. Respondents also seized a quantity of butter at petitioner's plant delivered there for processing and sale in interstate commerce. Most of this butter was collected in states without Alabama and brought to Birmingham for renovation. Some of it was collected in Alabama. (R. pp 10 and 11.)

The respondents will, unless enjoined and restrained, continue their unwarranted interference with petitioner's raw material in interstate commerce. (R. p. 12.)

Country butter, referred to in the trade as packing stock butter, is the raw material used in the manufacture of process or renovated butter. It is acquired from small farmers and small producers of butter and small country stores and rolling stores that acquire the butter from small farmers or small producers of butter in ex-

change for cash, groceries or other commodities. (R. p. 5.)

Seventy-five per cent of the raw material handled by the petitioner originates without the State of Alabama and is transported to it in interstate commerce to Birmingham, Alabama. The raw material originating in Alabama is transported to the petitioner in Birmingham, Alabama, for manufacture of process or renovated butter for shipment in interstate commerce to points without the State of Alabama. None of the raw material is sold, offered, exposed or kept for sale. It is acquired solely for the purpose of being processed or renovated at petitioner's plant in Birmingham, Alabama. All of the raw material enters into the stream of interstate commerce from the time it is acquired by petitioner and remains in said stream until the delivery of the finished product. (R. p. 5.)

Raw country butter is not a food but raw material out of which a food is manufactured. *The respondents have not seized the raw material in interstat. commerce because it is acquired, held, offered or exposed for sale as food.* They have seized the raw material because they claim the right to prevent, by seizure, the renovation of raw butter moving in interstate commerce, although the Renovated Butter Act as construed by the Federal Court authorizes the renovation of such material.

Renovation is to butter as pasteurization is to milk. Renovated butter is raw country butter which has been melted, cleaned up and rendered wholesome and edible by washing, boiling, clarifying, straining, refining, steril-

izing and pasteurizing the butter fat or oil and mixing the clean butter fat with pasteurized milk and churning it.

When petitioner started in business about twenty years ago its output was about 100,000 pounds annually. Its business has grown to an annual production of two million pounds, having a value in excess of $300,000.00 each year. (R. p. 6.)

Its finished product is sold in most of the states and large cities of the Union under rigid requirements of the health laws in each jurisdiction.

Renovated Butter Act

Congress enacted the Renovated Butter Act in 1902. It is found in the Act of May, 1902, Chapter 784, 32 Stat. 193, as amended, and is now conveniently located in Sections 2320-2327 inclusive, of the Internal Revenue Code. A part of the title of the original Act was "To Regulate the Manufacture and Sale of Certain Dairy Products."

In Section 5 of the Act of 1902, now Section 2325, I. R. C., it is provided:

> "The Secretary of Agriculture *is authorized and required to cause a rigid sanitary inspection to be made* . . . . of all factories and storehouses where process or renovated butter is manufactured, packed . . . . and *of all the products thereof and materials going into the manufacture of same*. . . . The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be as-

certained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. *And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product*, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."
(Emphasis supplied.)

Section 4 of the Act of 1902, now Section 2322, I. R. C., requires every manufacturer of process or renovated butter to conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of Agriculture, may by regulations require.

Regulations

Order No. 1, Bureau of Dairy Industry, revised December 24, 1936, and promulgated by the Secretary of Agriculture on that date contained regulations that cover in detail every possible phase of the manufacture of process butter for sale or shipment in interstate commerce. The regulations are entitled, "Regulations for Carrying into Effect the Process or Renovated Butter Act" and are found on pages 20 and 34 of the transcript where they appear as an exhibit to the complaint.

Section 1 of Regulation 4 provides:

"Rigid sanitary inspections *will also be made of the character and condition of the materials going into the manufacture of processed or renovated butter* and all quantities and qualities of processed or renovated butter manufactured."

Section 12 of Regulation 4 provides:

"The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof."

Sections 1 and 2 of Regulation 7 provide:

"Section 1. *To determine whether or not materials used in the manufacture of process or* renovated *butter are deleterious to health or unwholesome in the finished product,* a sample of such processed butter shall be taken."

"Section 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one churning, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the

opinion of the inspector, such action is necessary to obtain representative samples of such butter."

The provisions of the Meat Inspection Act enabling Government agents to determine the suitability of raw material is made applicable to the Renovated Butter Act by Section 2327 (b) I. R. C.

The relevant provisions of the Renovated Butter Act, the Regulations for carrying it into effect, and the statutes of Alabama under authority of which respondents claim to act are set out under appropriate headings in the appendix.

No question of fact is involved. The legal questions in the case were stipulated between the parties and are found on page 36 of the record. They read:

Stipulation

"The parties to this cause stipulate and agree that the legal questions in dispute between the parties are:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the

United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

"3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

"4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

"5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean 'procured, transported, handled, or sold as alleged in the complaint,' as the context may indicate."

The bill was dismissed on motion alleging it failed to state a claim upon which relief could be granted and presented no substantial Federal question. (R. p. 34.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the decree of the United States District Court for the Middle District of Alabama.

2. In holding, in effect, that Congress has not pre-empted the field as to the inspection and regulation of raw material in interstate commerce for manufacture into processed butter for sale and shipment in interstate commerce.

3. In holding, in effect, that the Alabama statute (the Alabama Agricultural Code) authorzies officers of the State of Alabama to seize raw materials moving in interstate commerce for manufacture into processed butter for sale and shipment in interstate commerce.

4. In holding, in effect, that State officers may supplement and duplicate the work of the Federal Government in policing raw material in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce.

5. In holding, in effect, that to obtain relief from enforcement of State Police Regulations upon the claim that Federal Regulations have pre-empted the field, it must appear that there is *an express or implied prohibition against State regulations.*

6. In holding, in effect, that to obtain relief from enforcement of State Police Regulations upon the claim that Federal Regulations have preempted the field, it must appear that there is such an essential conflict between State and Federal laws and regulations as that

compliance with the one is defiance of the other, and therefore a prohibition against State regulation must be implied.

7. In holding, in effect, that State officers enforcing by seizure police regulations with regard to foods, will not be enjoined at the suit of persons complaining of them merely because there exist similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure.

PROPOSITIONS OF LAW

Proposition One

(a) The allegations of the complaint show that the matter in controversy, exceeds, exclusive of interest and costs the sum or value of $3,000, and arises under the Constitution or laws of the United States. The action is thus cognizable under Section 41, subdivision 1 of the Judicial Code.

U. S. C. A. Title 28, Section 41.
Grandin Farmers Co-Op. Elevator Co. vs. Langer (Three Judge Court), 5 Fed. Sup. 425;
Affirmed memorandum opinion 292 U. S. 605,
Lemke vs. Farmers Grain Co., 258 U. S. 50;
Vicksburg Waterworks Co. vs. Vicksburg, 185 U. S. 66;
The Fair vs. Kohler Die Co., 228 U. S. 22.

(b) In an action charging State officials with construing and attempting to enforce State Statutes in such

a manner that the same are in conflict with the Constitution or laws of the United States or rights thereby vested are infringed upon, and the amount in controversy exceeds the sum of $3,000, a federal question is presented, the Federal Courts being concerned with the operation and effect of the State laws as put in force by its authorized officers. Such action is not one against the sovereign State.

General Oil Co. vs. Crain, 209 U. S. 212;
Smyth vs. Ames, 169 U. S. 466;
Reagan vs. Farmers Loan and Trust Co., 154 U. S. 362;
St. L. & S. W. R. Co. vs. Arkansas, 235 U. S. 350;
Mountain Timber Co. vs. Washington, 243 U. S. 219.

(c) The action may also be predicated under subdivision 8 of Section 41 of the Judicial Code by which jurisdiction is given District Courts "of all suits and proceedings arising under any law regulating commerce."

Young & Jones vs. Hiawatha Gin & Mfg. Co., 17 Fed. (2nd) 193;
Davis vs. Age-Herald Pub. Co. (C. C. A. 5th Cir.), 293 Fed. 591.

Proposition Two

Congress has preempted the field of inspection and regulation of packing stock butter in commerce.

Renovated Butter Act of 1932;
32 Stat. 193-197; 37 Stat. 273;;
U. S. C. A. Title 26, Sec. 990-997, I. R. C. Sec. 2320-2327;
U. S. Department of Agriculture Regulations for Carrying into Effect the Process or Renovated Butter Act, Bureau of Dairy Industry Order No. 1. Revised issued December 24, 1936;
Oregon-Washington Railroad Company v. Washington, 270 U. S. 87;
Napier v. Atlantic Coast Line, 272 U. S. 606;
Southern Railway v. Reed, 222 U. S. 424
Gibbons v. Ogden, 9th Wheaton 1.

Proposition Three

The full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. On the contrary, wherever interstate and intrastate transactions are so related the government of the one involves control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule.

15 *Corpus Juris Secundum*, Sec. 7, page 264;
11 *Amer. Jur.*, Sec., 14, page 16;
Minnesota Rate Cases, 230 U. S. 352;
Currin vs. Wallace, 95 Fed. (2d) 856, Aff. 59 Sup. Ct. 379.
Id. 306 U. S. 1
Stafford vs. Wallace, 258 U. S. 495, 528;
Chicago Board of Trade vs. Olsen, 262 U. S. 1, 43;
Lemke vs. Farmers Grain Co., 258 U. S. 50.

Proposition Four

The Alabama Agricultural Code does not extend to or include interstate commerce.

State vs. Cecil, 216 Ala. 391.

Proposition Five

Where Congress regulates commerce by enacting a statute within its competency the exercised power of Congress supersedes any existing state law on the same subject, and excludes additional or further regulation covering the same subject by the state. *It is not necessary for Congress to expressly exclude state action in such cases.*

Southern Railway v. Reed, 222 U. S. 424;
Napier v. Atlantic Coast Line, 272 U. S. 605;
Oregon-Washington Company v. Washington, 270 U. S. 87;
North Pacific Railroad Co. v. Washington, 222 U. S. 370;
Prigg v. Penn., 16 Peters 539;
Erie Railroad Co. v. N. Y., 233 U. S. 671;
N. Y. C. R. R. Co. v. Winfield, 244 U. S. 147;
Erie Railroad Co. v. Winfield, 244 U. S. 170;
C. R. I. & P. Railroad Co. v. Hardwick Co., 226 U. S. 426;
Missouri Pacific Railroad Co. v. Porter, 273 U. S. 341;
Farmers Grain Company v. Langer, 273 Fed. 633;
L. & N. Railroad Co. v. State, 16 Ala. App. 199; Supreme Court Opinion at page 204;
Hines v. Davidowitz, 61 Sup. Ct. Rep. 399;

Missouri Pacific Railroad Co. v. Stroud, 267 U. S. 404;
Adams Express Co. v. Croninger, 226 U. S. 491;
Charleston & W. C. R. R. Co. v. Varnville Furniture Co, 237 U. S. 597;
Missouri Pacific Railroad Co. v. Porter, 273 U. S. 341.

(b) "The elementary and long settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme."—White, C. J. in C. R. I. & P. R. R. Co. vs. Harwick Farmers Elevator Co., supra.

(c) Congress, having entered into the regulation of a particular subject of interstate commerce, "must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient, and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities are supreme; and as that power has been exercised, state laws have no application. They cannot be applied in coincidence with, as complementary to, or in opposition to federal enactments, which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

Missouri-Pac. R. Co. v. Porter, Supra.

Proposition Six

Inasmuch as Congress has entered the field of inspecting the raw materials used by plaintiff and the determination of their suitability for use in the finished

products to be sold in interstate commerce, the plaintiff has the right to conduct its business in interstate commerce without interference on the part of the defendants acting under State laws, whether otherwise applicable or not, but which, at most, undertake to cover precisely the same ground under the same standards as the Federal regulation.

Farmers Grain Co. v. Langer, 273 Fed. 635, affirmed, 258 U. S. 50.
McDermott v. Wisconsin, 228 U. S. 115.

Proposition Seven

(a) State statutes *relating to food* which have been held not to conflict with federal legislation regulating commerce, and not to regulate directly, or to impose a direct burden on interstate commerce, are those controlling food in the *intrastate* aspect of the public health, and statutes which are similar to the federal Pure Food and Drug Act, but relate only to intra-state transactions, or which deal with the adulteration of food and drugs, but are intended to protect consumers in the state, *and are not applied to articles manufactured in the State and transported in interstate commerce.*

15 *Corpus Juris Secundum*, Sec. 86, page 429.

(b) The general tendency of the Courts and of most local enforcement agencies is to so construe state statutes, regardless of the generality of their terms, and to confine their operations to intrastate matters, so as not

to conflict with Federal enactments or otherwise invade the field of interstate commerce.

State v. Cecil, 216 Ala. 391;
Day-Beigwall Co. v. State, 207 N.W. 959, 190 Wis. 8;
State v. Peet, 80 Vt. 449, 130 A. S. R. 998, 14 L. R. A. (N. S.), 677;
L. & N. R. R. Co. v. State, 16 Ala. App. 199 (Supreme Court response, p. 204).

(c) The committee reports and debates in Congress when this act was under consideration show that Congress was fully aware of the necessity for regulating and providing for proper inspection of this industry and that its intention to enact laws to fully cover the field and adequately protect the public is beyond question.

Congressional Record 57th Congress, pages 1301, 1303, 1352, 1595, 1624, 1625, 1630, 1658, 3278-79, 3282; 3316, 3459; 3607; 3241, 3242; 3271, 3272; 3277, 3282, 3283; 3316, 3321, 3454, 3459, 4586.
Appendix 46-47; 177-178.
Senate Committee on Agriculture pages 4, 5, 6, 7, 8, 9, 24, 49, 50, 51, 52, 53.

Proposition Eight

(a) Under the facts alleged in the bill, plaintiff's operations in buying, transporting, storing, and manufacturing the packing stock butter and sale of the finished product in interstate commerce constitute by far the greater portion of its business; its interstate and intrastate operations are necessarily indivisible. It is,

consequently, considered as engaged in interstate commerce, and to be regulated as such.

Grandin Farmers Co-op. Elevator Co. v. Langer, 292 U. S. 605.
U. S. v. Darby Lbr. Co., 61 Sup. Ct. 451.
Labor Board v. Jones & Laughlin, 301 U. S. 1.
Lemke v. Farmers Grain Co., 258 U. S. 50.
Shafer v. Farmers Grain Co., 268 U. S. 189.
Nor. Pac. Ry. v. Washington, 222 U. S. 370.
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282.
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Affirmed U. S. Supreme Court, 306 U. S. 1.
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Nat'l Labor Relations Board v. Santa Cruz Etc. Co., 91 Fed. (2d) 790, affirmed 303 U. S. 453.
Wilson & Co. v. Nat'l Labor Relations Board, 103 Fed. (2nd) 243.
Tagg Bros. v. U. S., 280 U. S. 420.

(b) In determining what is interstate commerce, Courts look to practical considerations and the established course of business.

Foster-Fountain Pkg. Co. v. Haydel, 278 U. S. 1.

Proposition Nine

Articles moving in interstate commerce cannot be interfered with before transit is completed even though subjected to State police power by congressional action.

Rhodes vs. Iowa, 107 U. S. 412.

ARGUMENT

May It Please The Court:

We are not dealing with food in this case, but with raw material used in the manufacture of food. In so far as renovated butter is concerned State and National legislation is identical.

Title 2, Section 306 of the 1940 Alabama Code, under which respondents claim authority to stop a truck loaded with country butter moving in interstate commerce from Georgia to Alabama, provides:

> "Section 306. Adulteration of food—An article shall be termed adulterated *in the case of food*: . . . . if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance."

Section 11 of Regulations 5 of the Regulations which carry into effect the Process or Renovated Butter Act issued December 24, 1936 by the United States Department of Agriculture, as embodied in Bureau of Dairy Industry, Order No. 1, provides as follows:

> "Section 11. Process or renovated butter containing any filthy, decomposed or putrid animal or vegetable substance shall be termed adulterated under the Foods and Drug Act."

In Alabama Agriculture Code 1927, §36 now Title 2, Section 303, of the 1940 Alabama Code, the Legislature of Alabama made it the duty of the State Board of Agriculture to fix the standard of purity for *all food*

"which shall be, so far as practical, in accordance with the standards promulgated by the Federal Government through its duly authorized agents."

As regards standards for the raw material out of which renovated butter is manufactured, the parties stipulated and agreed that there is no conflict in the standard of the State of Alabama and the Federal Government relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter. (R. p. 36.)

The complaint in this case is, not there is conflict between State and Federal standards. The complaint is that the State is precluded from enforcing any standard for packing stock butter in interstate commerce *because Congress has already prescribed a standard for it and provided for its enforcement.* A further complaint is that the *respondents*, State officers, *have gone* and intend to continue going beyond the standard provided by Congress *and beyond any State standard for packing stock butter* and are attempting to compel the raw material in interstate commerce to conform to a standard that is not applicable to packing stock butter. Concretely stated the Congressional standard for raw material used in the manufacture of renovated butter is whether or not the materials entering into its manufacture are deleterious to health or unwholesome *in the finished product.* If the materials used are deleterious to health or unwholesome *in the finished product* they are under Congressional ban and inhibition. If the materials used are not deleterious to health or unwholesome in the fin-

ished product they are not under Congressional ban and are recognized by Congress and by the State as a legitimate article of commerce. This, we think, is made clear by Section 2325 of the I. R. C. and the Regulations promulgated pursuant thereto above referred to and by Title 2, Section 207 of the Alabama Code of 1940.

The respondents refuse to abide the Congressional standard provided for raw material used in the manufacture of renovated butter. The respondents are attempting to apply the standard prescribed *for food offered for sale as food*, in Title 2, Section 306 of the Alabama Code of 1940, to raw material instead of the standard prescribed by Congress. This presents the question whether Congress has completely entered and preempted the field of inspection and regulation of the raw material, and if so does such entry and preemption exclude state action in that field.

A

Congress Has Preempted the Field of Inspection and Regulation of Packing Stock Butter in Interstate Commerce.

This proposition is established by three things: (1) The affirmative action by Congress reflected in the Renovated Butter Act. (2) The comprehensive regulations promulgated by the Secretary of Agriculture of the United States completely covering the subject pursuant to the statute enacted by Congress. (3) Recognition and decision by the Supreme Court of Alabama that the Alabama Agricultural Code does not extend to or include interstate commerce.

When the Federal statutes and regulations relating to renovated butter are considered and analyzed, this question naturally arises: *"What more could Congress do than it has done to exclusively occupy the field of inspection of raw materials in interstate commerce going into the manufacture of process or renovated butter?"* We might phrase the question another way: *"What may the State of Alabama do in the way of inspecting raw material in interstate commerce going into the manufacture of process or renovated butter that the Secretary of Agriculture of the United States is not authorized to do by the Federal law and the regulations, which have the force and effect of law, promulgated pursuant to the mandate of the Federal Statute?"*

It is quite clear that anything that the State undertakes to do in the field of inspection of raw material entering into the manufacture of renovated butter is necessarily a duplication of a duty required of the Secretary of Agriculture by the Renovated Butter Act, or it is an attempt to do something the Secretary of Agriculture has not deemed necessary. Congress has very definitely and very clearly made it the duty of the Secretary of Agriculture to determine whether the materials in interstate commerce going into the manufacture of renovated butter are deleterious to health or unwholesome *in the finished product.* How he determines that is left up to him. Congress very wisely left the method to be used in the performance of that duty exclusively to the Secretary of Agriculture. It recognized that methods may change as time passes on, and left him free to use any available method.

Congress having expressly authorized the Secretary of Agriculture of the United States to inspect the raw material in interstate commerce and to determine the wholesomeness and purity of the finished product in interstate commerce, it would seem that there is no warrant for respondents usurping his authority or undertaking to perform his duty. In the very nature of things authority should be vested in some official to determine whether raw material for manufacture into renovated butter is fit to enter and be transported in the channels of commerce. It may be that the State might act in the absence of Congressional action, but that is not the case at bar. *In this case Congress has acted.* Congress has designated the Secretary of Agriculture of the United States as the official on whom it imposed the duty to determine whether or not raw material for manufacture into renovated butter is entitled to enter the channels of interstate commerce. We do not believe that the Renovated Butter Act or the regulations above referred to are capable of any other construction.

The Renovated Butter Act is as comprehensive, if not more comprehensive than the Interstate Commerce Act construed in *Southern Railway Company vs. Reid*, 222 U. S. 424-442.

It is more comprehensive than the Boiler Inspection Act construed in *Napier vs. Atlantic Coast Line*, 272 U. S. 606. In that case Congress had not legislated specifically in respect to the device involved, which was an automatic fire box door and a cab curtain required by the State Act to conserve the health of the fireman

by protecting him from exposure to extremes of heat and cold while performing his duties.

The power delegated to the commission in that case was a general one. The power delegated to the Secretary of Agriculture in this case is even broader. He is required to determine whether raw material entering into the manufacture of renovated butter should be allowed to enter the channels of commerce, and he is given unrestricted authority to promulgate rules and regulations to enable him to perform that duty.

The Renovated Butter Act is as comprehensive as the Quarantine Act involved in the case of *Oregon-Washington RR. Co. vs. Washington*, 270 U. S. 87. In that case the Secretary of Agriculture was empowered to determine when a quarantine was necessary to prevent the spread of dangerous plant disease or insect infestation. In passing on that Act the Court said:

> "It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the care of the horticulture and agriculture of the States, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine as between the States under the direction and supervision of the Secretary of Agriculture."

And so say we here. It is impossible to read the Renovated Butter Act and consider its scope without

attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the duty of determining whether raw material entering into the manufacture of renovated butter should be permitted in the channels of commerce. All the sections and all the regulations promulgated under the statute look to complete control of raw material in interstate commerce by the Secretary of Agriculture of the United States.

Legislative History of the Act of 1902

In our opinion, a better understanding of the objects and purposes of the Federal Renovated Butter Act of 1902 may be obtained by a brief outline of the origin and history of the product, as disclosed by Committee hearings and debates while the subject was under consideration by Congress, as well as Year Books and Bulletins of the United States Department of Agriculture, Trade Journals and matters of common knowledge.

Preceding any legislation respecting the product, considerable traffic under various trade names of re-worked, re-packed and manipulated farm butter had developed throughout the principal dairying sections and in shipments to large manufacturing centers.

When it is stated that not until 1917 did the manufacture of creamery butter exceed the output of farm made butter in the United States (Technical Bulletin No. 722 U.S.D.A.) the extent and magnitude of the trade is apparent.

Factory or creamery butter, as a separate commodity, was first listed in United States Census tabulations

in 1879 when only 29,422,000 pounds of butter were factory made. In 1900, 71% of all butter produced was farm made butter. Within most recent years, the output of farm butter is said to have averaged nearly one-third of creamery butter.

At the turn of the century, practically all farm butter was sold and handled through country stores in exchange for staple food products.

With such a volume of farm made butter its sale, distribution and regulation became a problem of considerable importance. Especially in view of the fact that the consumers in the industrial centers are usually a great distance from the farms where it is produced, and as the natural product is subject to becoming rancid and other undesirable features if not properly handled.

At first, farm made butter was sold in towns and cities as it was delivered by the farmer. Later, such butter was centralized in larger towns or cities where it was washed, reworked, resalted, and colored uniformly and marketed as "Ladle," "Factory," or "Imitation Creamery" butter. Under such conditions, the quality of the materials, the sanitary conditions surrounding the processing, and the wholesomeness of the product, varied according to the varying standards of the individual producer. In 1894 a commercial "process" factory was established in Chicago, which was probably the first of its kind. Others rapidly followed.

Patents covering the process of melting and aerating the melted butter oil before rechurning in milk or cream were granted in 1895 and other patents covering various methods of treating such farm butter by use of

chemicals were also granted. As early as 1883 experiments for treating miscellaneous lots of farm butter by melting and rechurning were commenced in Missouri, and in 1885 in Baltimore, Md: (1905 Year Book U. S. D. A.). Such treated or manipulated butters were first sold to jobbers under various names,—"Process" Butter being the one most commonly used. It is said that in practically all cases, however, such treated butters were sold to the consumer, either as dairy butter or creamery butter.

Following the increased number of creameries and factories making process or renovated butter, a number of States adopted Renovated Butter laws during the period from 1898 to 1901 for the purpose of preventing the sale of such process or renovated butter for other than what it actually was—a remade, reworked or manipulated product. Unlike most other laws pertaining to dairy products, the principal purpose of all of these early State regulations (as far as we have been able to ascertain) seemed to be merely to prevent fraud and deceit, rather than to protect the health of the consumer.

As shown by the Act of 1902 and the amendment of 1912, Congress, in taking cognizance of the situation, not only required the product to be plainly labeled and sold for what it actually is, but went further, and made full and complete provisions for the complete inspection and regulation of the raw materials, the storage and manufacturing facilities and the finished product itself; making the wholesomeness of the finished product the test of its right to be transported in interstate

commerce. It also charged the United States Secretary of Agriculture with the duty of inspecting such raw materials, factories, finished products, etc., and of promulgating the necessary regulations for the absolute control of the industry when engaged in interstate commerce.

With the advent of the National Law of 1902, the States thereafter seem to have paid little attention to the enforcement of their local laws, as it was considered that such factories and product were more completely controlled and regulated by the rules and inspection afforded under the Federal laws by the Department of Agriculture.

Although the State of Alabama, in 1923, adopted a Pure Food law modeled after the National Pure Food and Drug Act of 1906, which was subsequently embraced in the Agricultural Code of 1927, among the provisions of which butter produced by any process commonly known as boiled, process or renovated butter was prohibited to be sold in the State unless the word "Renovated Butter" be labeled plainly with Gothic or bold faced letters at least three fourths of an inch in height on the top and sides of the container (Agricultural Code, 1927, sec. 71; Code of Alabama, 1940, Title 2, sec. 207) until recently, no interference has been made by State officials with the packing stock (the use of which is recognized in section 71) or other interstate features of appellant's operations.

Purpose of Act

The Legislative History of the renovated butter act as shown by the records of the 57th Congress at which it was adopted clearly evidences the knowledge of Congress of conditions then existing in that industry and its purpose to provide effective regulation and inspection of the raw materials used and the sanitary conditions under which process or renovated butter is manufactured.

This act had its genesis in legislation relating to oleomargarine. The first Federal action along this line was the Act of August 2, 1886, chapter 840, 24th Statutes 209, which did not touch the subject of process or renovated butter. In the 56th Congress a bill was introduced in the house known as the Grout Bill which undertook to further regulate the oleomargarine industry, but did not mention process or renovated butter. Lengthy hearings were held by the House Committee on agriculture and that bill passed the House but not the Senate.

The same bill was re-introduced in the House in the succeeding 57th Congress (House Bill 9206) and again referred to its Committee on Agriculture where, after further hearings, a majority reported favorably and a substitute was offered by a minority. Neither report made any references to process or renovated butter.

At that time many process butter factories were being operated throughout the country. Statement was made on the hearing before the Senate Committee February 18, 1902, that there were about 485 renovated

butter factories in the country and only about 27 oleomargarine factory.

"Senate Hearing on House Bill 206, Senate Committee on Agriculture," page 24.

Both before the House and the Senate Committees in the debates in both Houses frequent references were made to the deplorable conditions of the raw material used to manufacture renovated butter, the manner in which it was gathered, and the unsanitary methods employed in the plants themselves. It was charged that the necessity for effective regulation and inspection of the process or renovated butter was much greater than that of oleomargarine. The opponents of the oleomargarine bill challenged those favoring it to sponsor legislation which would remedy the evils in the process or renovated butter business. (See Congressional Record, 57th Congress, House Bill 9206, pages 1301, 1303, 1352, 1353, 1595, 1624, 1625, 1630, 1658; speech by Mr. Grosvener, appendix pages 46-47; 177-178). While the matter was under discussion in the House, Mr. Allen of Kentucky introduced an amendment to the oleomargarine bill (Congressional Record, page 1352) which provided that the Secretary of Agriculture was authorized and required to cause a rigid sanitary inspection to be made from time to time and at such times as he may deem necessary of all factories and store houses where butter is renovated; and all butter renovated at such plants shall be carefully inspected in the same manner and to the same extent and purpose as meat products were then inspected, and that the quantity and the quality of butter renovated should be reported monthly; and

requiring such butter to be branded or labeled as renovated butter in such manner as the Secretary of Agriculture might prescribe and authorizing the Secretary of Agriculture to make all necessary sanitary and other rules and regulations for carrying that section into effect.

The Allen Amendment did not contain the provisions that the Secretary of Agriculture, "shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome material is found to be used in products intended to be used in exportation or shipment into other states, he shall have power to confiscate the same," as is provided by the law which was finally adopted.

The bill with the Allen Amendment was adopted in the House February 12, 1902 (Congressional Record, 57th Congress, page 1658).

In the Senate the bill was referred to its Committee on Agriculture which also conducted hearings. There the opponents again made frequent charges concerning the raw material and conditions pertaining to the process or renovated butter industry and its need for regulation. (Senate Hearings on House Bill 9206, Senate Committee on Agriculture, pages 4, 5, 6, 7, 8, 9, 49, 50, 51, 52, 53). However, the majority report struck the Allen Amendment and reported the bill as it was first introduced in the House. On the floor of the Senate the charges concerning the renovated butter industry were more frequent and fuller. The committee was criticized

for recommending elimination of the Allen Amendment.

Many Senators objected to the passage of the bill without provisions regulating process or renovated butter. Senator Culbertson offered an amendment to the entire bill (Congressional Record, pages 3278-79). In the discussion Senator Lodge stated that he favored the oleomargarine bill but further said: "Whatever may be thought of oleomargarine—I believe in itself it is generally considered an innocuous product. There is no doubt that process butter, renovated butter, is as bad an article as can possibly be devised; and I do not think this bill ought to pass without a suitable provision in regard to renovated butter." It was then stated by Senator Quarrels that an amendment had been offered which provided for that (Record, page 3282).

Senator Proctor then stated, in substance(that the Committee reported in favor of striking out the Allen Amendment for the reason that it was very imperfect and would not accomplish the purpose aimed at and that Senator Harris had offered an amendment fully covering renovated or process butter and adulterated butter (Congressional Record, page 3282).

The Harris Amendment is set out on page 3316 of the Congressional Record. This amendment, though amended in some respects, forms the basis of the present law relating to process or renovated butter. Concerning his amendment, *Senator Harris said*: "* * * *There has been a great deal of complaint made and I think with justice, that the health of the consumer is injured by what is called process or renovated butter. I*

think the amendment I have offered practically protects in the most efficient way, the interest of the consumer in that direction." (Congressional Record, page 3316.) (Emphasis supplied.)

He further referred to the condition of material and methods of manufacture of oleomargarine prior to the Act of 1886 which he said were checked by that Act and that the bill had been the salvation of that industry and stated:

> "I believe that the regulation which is imposed upon renovated or process butter by the amendment which I have offered will be of equal value to the great dairy interest of this country. They are in danger, I think, of being rendered obnoxious on account of the improper process used by the manufacturers of renovated or process or adulterated butter. *Because it is to protect the purity of the food products of this country I think that this legislation justifiable and proper*" (Congressional Record, page 3317). (Emphasis supplied.)

During the discussion, *Senator Proctor who had charge of the bill stated that the Harris Amendment so far as butter is concerned, is a Pure Food Bill* (Congressional Record, page 3459).

The Harris Amendment in its final form as adopted by the Senate is set out on page 3607 of the Congressional Record. The bill was passed by the Senate April 3, 1902. Statements concerning the character of the raw material and other conditions in the process or renovated butter industry and the necessity for congressional action for the protection of the public by

regulation and inspection as shown by the Congressional Record, were made by: Senator Money, pages 3241-3242; Senator Proctor, page 3242; Senator Stewart, pages 3271-3272; Senator Dolliver, page 3277; Senator Lodge, page 3282; Senator Quarrels, page 3282; Senator Proctor, page 3282; Senator Stewart, pages 3282-3283; Senator Harris, pages 3316-3317; Senators Heitfeld, Harris and Money, page 3321; Senator Simmons, page 3454, and Senator Proctor, page 3459.

In explaining changes made by the Senate to the House sitting as a Committee as a whole, Mr. Henry among other things stated (Congressional Record, page 4586) that the Senate amendment struck out the imperfect House provision for regulating the manufacture of process or renovated butter and substituted a sure and comprehensive law for identification and taxation of the product under supervision of the Treasury Department, and for inspection, sanitary control and regulation under the Department of Agriculture.

In view of the fact that Mr. Henry had at first objected to the incorporation of the Allen Amendment into the House bill, it is significant that after quoting from a statement by Mr. Wells, Dairy Commissioner of Pennsylvania, as to materials used and methods of manufacturing renovated butter he stated, "With these facts before us, who can say that restrictive legislation is unnecessary" (Congressional Record, page 4586).

He further said (Congressional Record, page 4587), "It is anticipated that this legislation will prevent fraud, protect the public from an article of food of unknown

or doubtful origin, and insure to the purchasers of butter the pure product of the churn and dairy."

With an unimportant amendment as to the definition of process or renovated butter the House concurred in the Senate Amendment April 3rd, 1902.

In the *Bohl case*, 125 Fed. 625, at p. 626, the Court said:

> *"Other provisions of the (Renovated Butter) Act in question may gain their efficacy from the taxing clause of the Constitution, but Section 5 goes to the commerce clause as the fountain whence its vigor springs."* (Italics supplied.)

The Section 5 referred to by the learned Judge is now codified as Section 2325 of the Internal Revenue Code, which makes it the duty of the Secretary of Agriculture to determine the suitability of raw material used in the manufacture of renovated butter.

The authorities cited and the language employed in the Statute negative the idea that the primary purpose of the Renovated Butter Act was to raise revenue. The revenue feature is incidental.

The legislative history of the Act of August 10, 1912, chapter 284, 37 Statute at Large 273, is also most significant and evidences the continuing purpose of Congress to give full authority to the Secretary of Agriculture to inspect the raw material prior to its being processed, in order to clear up a question which had been raised by the solicitor of the Department of Agriculture as to the authority of the Secretary in that respect.

This act was a part of the Agricultural Department

appropriation Act of August 10, 1912, and is codified as Section 997 (b), (c) Title 26, United States Code Annotated. Section 2327 (b) (c) I. R. C. The text of the act being: "That the sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in Act of June 30, 1906, (34 Statutes, page 676) are hereby extended to cover renovated butter factories as defined in the Act of May 9, 1902, under such regulations as the Secretary of Agriculture may prescribe."

This provision was contained in House Bill 18960 as reported by the Committee on Agriculture.

In speaking of this provision, when it was left to the House sitting as a committee as a whole, Mr. Lamb said:

> "Mr. Chairman, this matter was carefully gone over by the committee, and I submit the following: there are some fifty renovated butter factories in the United States, and while the department is authorized to inspect the finished products, it has no authority to destroy the butter that is made up into the finished product, nor has the authority to compel sanitary conditions in such factories. Such opportunity is sought by the amendment requested. We asked Dr. Melvin particularly on this point."

He then quoted from the testimony of Dr. Melvin before the Committee and further said:

> "We interrogated other men who were before us on this point and came to the conclusion that notwithstanding the fact that this new language was subject to the point of order, that it was so necessary, we would submit it to the House in confidence that it was good legislation and ought to be adopted."

(H. B. 18960, 62nd Congress, page 2690-2691).

This legislative history shows that the purpose of the amendment was to clarify the law and remove any doubt as to the authority of the Secretary of Agriculture to seize the raw material if it was unfit for conversion into a wholesome finished product. The amendment was advocated by the solicitor of the Department of Agriculture and experts from that department supported it by testimony. The amendment was thrown out on a point of order in the House and restored to the bill in the Senate and it was adopted by a conference committee and approved by the House and Senate. (Congressional Record).

The Government has already taken cognizance of the tendency of various states to interfere with renovated butter in interstate commerce. In a summarized report of the legal subcommittee of the Interdepartmental Committee on Interstate Trade Barriers, published December, 1940, attention is called to the effort on the part of some of the States to interfere with renovated butter in interstate commerce in the following language:

> "The Bureau of Dairy Industry, United States Department of Agriculture directs attention to the laws of the various States relating to process or renovated butter and the relationship of such laws to Federal regulation covering the same subject matter. It is the opinion of the administrative officials of the Bureau of Dairy Industry that several States have laws which conflict with such Federal law. The Subcommittee is of the opinion that the Committee might advantageously cooperate with

the Bureau of Dairy Industry in securing the removal of these conflicting State laws."

That there is a field for the process or renovated butter business must be conceded. Otherwise, a large quantity of farm butter would be absolutely wasted, and many consumers deprived of the use of a most healthful article of food. It is also true that under modern conditions, the farm butter must be obtained from the producers themselves, or more frequently, the small country and rolling stores, and transported in interstate commerce to plants hundreds of miles from the farm where it originated, to a large establishment, and then after the process of cleaning, pasteurization, clarifying, rechurning, etc., has been completed, again shipped to the various industrial centers all over the country. That efficient regulation is necessary is not questioned, but, on the other hand, welcomed by the appellant; that such inspection and regulation should be made by experts in the line and under uniform standards, rather than whimsical or partisan methods seems to us to be equally true.

Congress has attempted to meet the situation by the Act of 1902 and the application of the Meat Inspection Laws. That the United States has and should have complete staffs and facilities for the performance of his duties under these laws can scarcely be a matter of argument; that the regulations promulgated by the Secretary are strict and complete and that the Bureau of Dairy Industry to which the enforcement of the regulations has been committed is both conscientious and efficient is not debatable.

As a matter of history, only those plants that have been able and willing to meet the rigid federal inspection and regulation have survived.

The plants that have stood the test have established a large and ever increasing business in interstate commerce, and we might add, are constantly striving to improve their products.

The record in this case shows without dispute that the appellant has built up a large business during its twenty years operation, and is unable to supply the demand for its finished product. With due respect, we might adopt the slogan of a well known, nationally advertised product: "Such popularity must be deserved."

As we understand the opinion of the Circuit Court of Appeals that Court seems to have conceded that Congress has occupied the field by legislation and most comprehensive regulations, but the Court seems to say that the State may also enter the field until Congress expressly tells the State to stay out.

That brings us to the second proposition in the case.

B

Where Congress regulates commerce by enacting a statute, within its competency, the exercised power of Congress supersedes any existing State law on the same subject, and excludes additional or further regulation covering the same subject by the State; express exclusion by Congress is unnecessary.

The Circuit Court of Appeals in the majority opinion apparently concedes that Congress has completely occupied the field of inspection and regulation of raw ma-

terial in interstate commerce for manufacture into renovated butter. Neither our learned Attorney General nor the Circuit Court of Appeals has thus far pointed out any portions of the field unoccupied by Congress, but, says the Circuit Court of Appeals in effect, complete occupancy by Congress does not have the effect of excluding the State from the field unless Congress goes further and erects a "No Trespassing Sign" so to speak, reading something like this: "Congress has completely occupied this field. All others must keep out." This is made clear by the following quotation from the majority opinion:

> "We agree with the appellees however, that the district judge was right in denying the relief prayed and dismissing the bill as without merit. For, in our opinion, nothing in the [renovated butter] act or regulations under it, expressly purports to prevent, or impliedly purports to exclude the state from making and enforcing like regulations with those the United States lays down, for the purity and wholesomeness of ingredients to be used in the process of manufacturing food products in Alabama for sale there and in other states."

As opposed to the novel doctrine that both the State and the United States may occupy the same field at the same time and exercise jurisdiction over the same subject matter at the same time, say we, as this Court has said:

> "Commerce cannot flourish in the midst of such embarrassment."
>
> *Hall v. DeCuir*, 95 U. S. 485.

Moreover, *this is not a case in which the State is enforcing like regulations with those the United States lays down. When it comes to raw material* the regulation the United States lays down is that the raw material must not be deleterious to health or *unwholesome in the finished product.* The respondents are attempting to make the raw material conform to the food standard—not to the raw material standard provided by Congress.

One of the errors in the majority opinion of the Circuit Court of Appeals, as we see it, is the holding that Congress must not only completely occupy the field but must expressly or impliedly exclude the State from entering the field preempted by Congress, in order to exclude action by State officers.

We have always been under the impression that when Congress completely occupies the field *the Constitution does the excluding.* We maintain that complete occupancy of the field by Congress excludes others as a matter of law without Congress saying anything about it. It is an incongruity, a repugnancy in terms to say that Congress may completely occupy a field without excluding others from the field.

How many Federal statutes contain a provision expressly preventing or impliedly excluding the State from entering a field completely occupied by Congress? We have been unable to find a single one. The Circuit Court of Appeals did not refer to any legislation of that kind. The Attorney General has not called any legislation of that kind to our attention. In the century and a half that Congress has been enacting statutes, so far as

we are advised, Congress has never expressly excluded a State from a field completely occupied by Congress.

The idea that words directly inhibitive of the exercise of State authority must be employed before the State is excluded from a field occupied by Congress has been repudiated several times if we correctly understand the decisions of this Court.

The theory of concurrent powers was advanced in the case of *Gibbon v. Ogden*, 9 Wheaton 1, in which Chief Justice Marshall, in speaking of power of Congress to regulate interstate commerce, made the following response:

> "Like all others vested in Congress (this power) is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

Further Chief Justice Marshall stated:

> "In argument, however, it has been contended that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.
>
> "But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it."

The Renovated Butter Act takes possession of the subject of raw material and the finished product. In such cases it is said:

"It is true that words directly inhibitive of the exercise of State authority are not employed, but the subject is taken possession of."

Southern Railway Co. v. Reid, 222 U. S. 424-442.

It may be suggested that the standard provided by Congress for determining whether raw material entering into the manufacture of renovated butter should be permitted in the channels of commerce is not as high as the respondents would have it. It may be suggested that the standard is not as high as the Secretary of Agriculture is authorized to make it. Any suggestion of that kind is fully answered in the case of *Napier vs. Atlantic Coast Line*, 272 U. S. 606. The fact that the Secretary of Agriculture has not seen fit to exercise his authority to the full extent conferred, if such be the case, has no bearing upon the construction of the Act delegating the power. If the protection now afforded by the regulations promulgated by the Secretary of Agriculture is deemed inadequate, application for relief must be made to him or to Congress. The Secretary of Agriculture's power is ample.

It may be contended that inasmuch as the Secretary of Agriculture has not gone as far as he is authorized to go by the Renovated Butter Act, the State may operate in the unoccupied portion of the field.

Such construction as that cannot be given to the Federal Statute. The obligation to act; without respect to the States, is put directly upon the Secretary of Agriculture whenever inspection in his judgment is necessary. When he does not act it must be presumed that

it is not necessary. With the Federal law in force State action is illegal and unwarranted.

Oregon-Washington RR. Co. v. Washington, 270 U. S. 87.

The obligation to inspect raw material and to determine whether or not it should be permitted in the channels of commerce is placed directly upon the Secretary of Agriculture without respect to the States. His duty in the premises is not measured, neither is his power affected by anything a State may or may not do.

A case that completely answers any suggestion that the State may invade even a portion of an occupied field is *North Pacific RR. Co. v. Washington*, 222 U. S. 370. There Congress passed an Hours of Service law which was to become effective one year after its passage. During the pre-effective year the State of Washington passed a State Hours of Service Law. It was claimed that the State might operate during the time the Federal Statute was not in operation.

Chief Justice White, speaking for the Court, said:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. * * * To admit the fundamental principle and yet to reason that because Congress chose to make its prohibi-

tions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.

To like effect are:

L. & N. R. R. Co. v. State, 16 Ala. App. 199, Supreme Court opinion at page 204.
Prigg v. Pa., 16 Peters 539.
Erie R. R. v. New York, 233 U. S. 671.
N. Y. C. R. R. v. Winfield, 244 U. S. 147.
Erie R. R. v. Winfield, 244 U. S. 170.
C. R. I. & P. R. R. v. Hardwick Co., 226 U. S. 426.
Mo. Pac. Co. v. Porter, 273 U. S. 341.
Farmers Grain Co. v. Langer, 273 Fed. 635.

The Circuit Court of Appeals has in effect held that the Secretary of Agriculture has decided that material used in manufacturing renovated butter in interstate commerce should not be seized, until he determines whether such material is unwholesome or deleterious to health in the finished product, and that *his decision that it should not be seized, until he so determines, leaves the respondents free to seize it before he makes the determination required by Congress.*

If the Secretary of Agriculture is willing to give the industry an opportunity to clean up packing stock butter in interstate commerce, and to manufacture a whole-

some article from it, and then label it "Renovated Butter" and sell it as such, by what right can that plan for regulation *in interstate* commerce be vetoed by respondents?

In *Prigg v. The Commonwealth* of Pa., 16 Pet. 539, it was said:

> "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. * * *"

The record shows, and the opinion of the Court of Appeals recognizes, that the State regulations the respondents claim they are enforcing have exactly the same objective as the Renovated Butter Act and the regulations of the Secretary of Agriculture. Both are trying to accomplish the same thing.

However subtle the argument, the respondents' position is this: They claim the right as State officers to stop the movement in interstate commerce of raw material that Congress and the Secretary of Agriculture say is entitled to move. Congress says the raw material may move in interstate commerce if it is not de-

leterious to health or unwholesome in the finished product. These officers say it shall not move in interstate commerce, even though it is not deleterious to health or unwholesome in the finished product,—if it is otherwise sub-standard, even though the purpose of moving it is to bring it up to a standard. They claim the authority to prohibit, by seizure of raw material moving in interstate commerce, the manufacture of renovated butter from sub-standard raw butter for shipment and sale in interstate commerce. They do not say this in so many words but that is what they are in effect contending for. They are going far beyond any statute or regulation of the State. Everyone recognizes that raw butter may be sub-standard for any number of reasons. If it was not sub-standard it would not need renovation. Congress recognizes sub-standard raw material as a legitimate article of commerce. It recognizes the finished product as a legitimate article of commerce. If the State can stop the transportation of sub-standard raw material for renovation, that is the end of the renovated butter business as a practical proposition. The prohibition is as effective as if the State should say it shall be unlawful for any person to engage in the renovation of butter. Standard butter needs no renovation. The only raw material that can be used in the manufacture of renovated butter is raw country butter and the record in this case unquestionably shows that there is not enough raw country butter available in Alabama to meet the petitioner's requirements. (R. pp. 5 and 8.)

We are further fortified in our contention that the complete occupation of the field by Congress results in

the exclusion of the State from the field, by a well considered case by the Supreme Court of Alabama. In *State vs. Cecil,* 216 Ala. 391, the Supreme Court of Alabama expressly held that the enactment of the Alabama Agricultural Code was within the exercise of the police power of the State, but *the operation of the code was confined to intra state commerce.*

If this be true then it would seem that there is no statutory authority for the acts of the respondents complained of.

Before the respondents are authorized by the Alabama Agricultural Code to seize an article it must appear:

1. That the article seized is an article *of food* or drugs.

2. It must be adulterated or misbranded.

3. It must be manufactured for sale in Alabama, held in possession with intent to sell in Alabama, offered or exposed for sale in Alabama, or sold or delivered within Alabama. If it is not manufactured for sale or held in possession with intent to sell in Alabama, or not offered or exposed for sale in Alabama, or not sold or delivered within Alabama the Alabama Agricultural Code does not apply. *State v. Cecil, supra.*

The Record in this case refutes any claim that the packing stock butter seized in interstate commerce is an article of food. The petitioner's sole purpose in acquiring it and handling it is to work it over, clean it up and render it wholesome and safe, and after that has been accomplished, to sell and ship 90% of it in interstate commerce.

While the interstate character of the butter seized was not challenged below and was taken for granted by the Circuit Court of Appeals, the respondents intimated that they claimed a right to inspect the raw country butter moving in interstate commerce or held and used by the petitioner in interstate commerce for the purpose of manufacturing process butter, for sale and shipment in interstate commerce, because it is admitted that 10% of the finished product of petitioner's plant is distributed to consumers in Alabama through retail outlets in the State.

> "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."
> *Currin v. Wallace*, 306 U. S. 10;
> *Lemke v. Farmers Grain Co.*, 258 U. S. 50.

The interstate character of the article does not cease until it has become a part of the general mass of property in the State. The fact that the raw butter may be taken from the trucks and stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment does not take away the interstate character of the raw butter being held for such purpose.

> *Stafford v. Wallace*, 258 U. S. 495-528;
> *Chicago Board of Trade v. Olsen*, 262 U. S. 1-43.
> *National Labor Board v. Jones & Laughlin*, 301 U. S. 1.

We think these authorities show that this Court has

ruled that the raw butter does not cease to be in interstate commerce because it lays over in petitioner's plant in Birmingham for a few days awaiting manufacture into a pure and finished product for sale and shipment in interstate commerce. The raw butter is all the while in the channel of interstate commerce. The petitioner's plant in Birmingham, in such circumstances, is merely a conduit through which interstate commerce flows.

Where intrastate and interstate transactions are necessarily commingled and are so related that the government of the one involves control of the other it is Congress and not the State that is entitled to prescribe the final and dominant rule.

Currin v. Wallace, 306 U. S. 1-18;
Minnesota Rate cases, 230 U. S. 352;
Second Employers Liability Cases, 223 U. S. 1.

Where interstate and intrastate operations are necessarily indivisible, and the interstate operations are the dominant operations, the business must be considered as engaged in interstate commerce.

U. S. v. Darby Lbr. Co., 61 Sup. Ct. 451;
Grandin Farmers Coop. Elevator Co. v. Langer, 292 U. S. 605;
Shaffer v. Farmers Grain Co., 268 U. S. 190;
Lemke v. Farmers Grain Co., 258 U. S. 50;
Currin v. Wallace, 306 U. S. 1.

In determining what is interstate commerce the court looks to practical situations and the established course of business.

Foster Fountain Pkg. Co. v. Haydell, 278 U. S. 1.

THE CASES CITED IN MAJORITY OPINION

The Circuit Court of Appeals cited *Mintz v. Baldwin*, 289 U. S. 346 and some other cases on page 232 of the opinion in the Federal Reporter. We earnestly insist that the cases cited have been misinterpreted and misapplied. We will comment on the cases in the following order:

Mintz v. Baldwin, 289 U. S. 346:

Suit to restrain State enforcing regulation prohibiting the importation of cattle into New York unless the cattle and the herds from which they came were certified free from Bang's disease by the chief sanitary official of the State of origin.

> "Plaintiff shipped 20 head from Wisconsin for delivery to one Bartlett in New York. The animals were accompanied by a certificate which was sufficient as to them, but there was nothing to show the freedom from Bang's disease of the herd or herds from which they came. For that reason defendant refused to permit them to be delivered, and so plaintiffs were compelled to take them out of New York." (Page 348.)
>
> "The Federal Department of Agriculture, November 15, 1932, by letter to defendant declared that the *Department had issued no quarantine or regulation pertaining to Bang's disease and that its policy for the present is to leave the control with the various States.*" (Italics supplied.) (Page 349.)

"Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle which were about to be shipped * * * from such locality * * * and had found them free from * * * communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place in interstate commerce without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture. * * *" (Pp. 350-351.)

"The express exclusion of State inspection extends only to cases where Federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases. The expression of purpose so to limit the exertion of State power strongly suggests that Congress intended not otherwise to trammel the enforcement of state quarantine measures." (Page 351.)

The difference between the "Railroad Cases" and the *Mintz v. Baldwin* case is striking. In *Mintz v. Baldwin* the Government had issued no quarantine or regulation pertaining to Bangs disease and a governmental department official advised the State that it was the policy of the Government to leave the control of Bangs disease with the various States (pages 349.) Moreover, *the legislation itself* excluded State inspection *only* in cases where Federal inspection had been made and a certificate issued by the Federal inspector. That was a provision in the legislation there under review. The cattle involved were not inspected by a Federal inspector and no certificate was issued under Federal authority. No

certificate having been issued by the Federal inspector, the cattle involved were not under the protection of the Federal law, by the terms of the law itself. It is strongly implied in *Mintz v. Baldwin* that had a certificate been issued the State could not have interfered.

In *Mintz v. Baldwin*, it was optional with the cattle owner whether he would have his cattle inspected by a Federal inspector and obtain the certificate authorized by law in such cases. In the case at bar it is not optional with the petitioner as to whether the Secretary of Agriculture will inspect the raw material. The Secretary of Agriculture is required to perform that duty and to make the examination and finding required by statute, and to him is committed the sole responsibility for determining the suitability of the raw material for conversion into renovated butter for sale and shipment in interstate commerce.

If it be claimed that any particular lot of raw material seized by the respondents was not actually inspected by the Secretary of Agriculture prior to its seizure, that fact is no evidence that the Secretary of Agriculture would not have passed on the raw material *in due time*. Respondents stopped the truck from Georgia before the Secretary of Agriculture had any opportunity to act.

The respondents say that the *Mintz* case is to be distinguished from the *Napier* case and like cases because it was stated in the *Mintz* case that:

> "The purpose of Congress to supersede or exclude State action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear."

We have been unable to find any authority intimating that the purpose of Congress to supersede or exclude State action against the ravages of disease must more definitely and clearly appear than the purpose of Congress to supersede or exclude State action against the seizure of a legitimate article of commerce moving in the stream of interstate commerce. The makers of the Constitution of the United States had a purpose and that purpose was to exclude the State from the seizure of a legitimate article of commerce moving in the stream of interstate commerce.

Pacific States Co. v. White, 296 U. S. 176:

Suit to enjoin State order prescribing standards for containers in which berries were marketed.

> "*The standard prescribed by the order does not conflict with any established by Congress.* The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685, has no relation to the matter here under consideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel. The Standard Baskets and Containers Act of August 31, 1916, c. 426, 39 Stat. 673, which in Sec. 2 deals with containers for small fruits and vegetables, prescribes merely the capacity of the containers. It fixes the cubic feet contents for dry half-pint, pint and quart. It makes no reference to the dimensions or form of the container; and has left to the individual States the adoption of the standards in these respects if deemed necessary." (Page 182-183.)

Kelly v. Washington, 302 U. S. 1:

"Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provisions of c. 200 of the Washington Laws of 1907 (Rem. Rev. Stat., Secs. 9843 et seq.) relating to the inspection and regulation of vessels. (Page 2-3.)

* * * * * *

"There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, State regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid, if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' (Page 10.)

* * * * * *

"In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the State law touches that which the Federal laws and regulations have left untouched. (Page 13.)

* * * * * *

"We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the State law could operate without coming into conflict with present Federal laws." (Page 15.)

Which very clearly shows that the subject was not completely covered by Federal laws and regulations.

S. C. Highway Dept. v. Barnwell Bros., 303 U. S. 177:

Suit to enjoin State officers from enforcing State statute limiting weight and width of trucks on public roads while engaged in interstate commerce.

> "Appellees do not challenge here the ruling of the district court that *Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic*, and has left undisturbed whatever authority in that regard the States have retained under the Constitution. (Page 184.)
>
> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the State to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate." (Page 187.)

These quotations make it clear that the case turned on the proposition that Congress had not acted on the subject involved.

Currin v. Wallace, 306 U. S. 1:

Suit to declare Tobacco Inspection Act unconstitutional. It was claimed it was a regulation of intrastate commerce.

> "The Act states its scope and purpose. Sections 1, 2. It applies to transactions involving the sale

of tobacco at auction as commonly conducted at auction markets. These transactions are carried on by tobacco producers and by persons engaged in the business of buying and selling tobacco in commerce as defined, that is, in commerce which is interstate or foreign or is with or within the Territories or the District of Columbia. Congress finds that the classification of tobacco according to type, grade, and other characteristics affects the prices received; that 'without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation and control,' and 'unreasonable fluctuations in prices and quality discriminations occur,' constituting a burden upon commerce; and that the use of uniform standards is imperative 'for the protection of producers and others engaged in commerce and the public interest therein.' (Page 5-6.)

* * * * * * *

"Under the operation of the Act Federal inspectors examine the tobacco about an hour before the sale. They pull samples from each pile and place tickets indicating the grade. Each day there is displayed in the warehouse a report indicating the average price for the government grades sold on the previous day and weekly reports are issued for the preceding week. (Page 8.)

* * * * * * *

"Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the States to enact inspection laws is recognized by the Constitution. Art 1, Sec. 10,

par. 2. See Turner v. Maryland, 107 U. S. 38, 51-54; Pacific States Co. v. White, 296 U. S. 176, 181. *But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress.*" (Page 12.) (Emphasis supplied.)

This case supports the contention of Appellant. It was there held that the tobacco involved was in interstate commerce and congressional action respecting it was paramount.

Townsend v. Yeomans, 301 U. S. 454:

Suit to restrain the enforcement of a statute of Georgia fixing maximum charges for handling and selling leaf tobacco.

"The statute was assailed as an arbitrary and capricious exercise of State power, repugnant to the Fourteenth Amendment of the Federal Constitution, and as placing a direct burden upon interstate commerce in violation of the commerce clause." (Page 443.)

"Unless there is conflict with the authority of the Congress over interstate commerce, the enactment of the statute was clearly within the competency of the Georgia legislature. (Page 449.)

"The main contention of appellants is that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce. (Page 452.)

"We find it unnecessary to pass upon the authority of the Congress to regulate the charges of warehousemen, for we are of the opinion that, if it be assumed that Congress has that authority, *it has*

not been exercised and in the absence of such exercise the State may impose the regulation in question for the protection of its people. (Page 452.) (Emphasis supplied.)

"The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid Federal regulation." (Page 459.)

This case turns on the proposition that Congress had not exercised its authority.

In this connection we submit it is not necessary for the Federal Government to seize packing stock butter in order to exercise jurisdiction over it. If the Government requires inspection and prescribes a method by which it may be ascertained whether the packing stock butter measures up to a given standard, that, we submit, is as much an exercise of jurisdiction over packing stock butter as is a seizure of the butter itself.

We know of no authority holding that the State may duplicate the work of the Federal Government by the exercise of authority in a field occupied by Congress that Congress itself does not deem it necessary to exercise.

It is not necessary for the petitioner to show that the Federal Government has actually inspected and passed the particular products the State seized. It is only necessary for the petitioner to show that the Federal Government has provided a standard to which the raw material must conform and has made it the duty of a particular officer to see to it that the raw material conforms to the standard prescribed by Congress. When

it is shown that the Federal Government has prescribed a standard for the product seized, and that it has required the Secretary of Agriculture to ascertain and determine whether or not the material meets the standard prescribed by Congress, any further State action is excluded. It is not a question of whether the Secretary of Agriculture has acted. The question is, does he have the power to act? Is it his duty to act? If so that is the end of the inquiry.

The compliance-defiance test announced in the majority opinion is not compatible with the paramount power of Congress over interstate commerce. The compliance-defiance test was rejected in *Erie R. R. Co. vs. New York*, 233 U. S. 671, on the ground that it was not compatible with the paramount power of Congress over interstate commerce. The New York Court of Appeals attempted to sustain the legislation there involved because it found that:

> "The State has simply supplemented the action of the Federal authorities * * * and the form of the Federal statute * * * fairly seems to have invited and to have left the subject open for supplemental State legislation if necessary."

But this Court said:

> "It (the Federal Statute) admits of no supplement: *it is the prescribed measure* of what is necessary and sufficient for the public safety."

That language applies with peculiar force to the renovated butter statutes and the rigid regulations relating

to its manufacture. The condition of the finished product is the prescribed measure of what is necessary and sufficient for the public safety.

Again, in *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, it was said:

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. *In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.* * * *
>
> "When the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, *and that which needs must be implied is of no less force than that which is expressed.* If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—*the State law must yield to the regulation of Congress within the sphere of its delegated power.* Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182." (Emphasis supplied.)

In our headlight case, in which compliance with one was not defiance of the other, *L. & N. R. R. Co. v. State*, 16 Ala. App. at page 202, it was said:

"When we come to consider whether or not two powers—one superior and the other of inferior jurisdiction—occupy the same field, it would seem proper that any reasonable doubt, if such there is, should be resolved in favor of the superior jurisdiction."

The "compliance-defiance" test was also rejected in the *Napier* case, 272 U. S. 606 on pages 612-613, where the court said:

"The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the Federal and State laws are aimed at distinct and different evils; that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the State regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be State regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

"The Federal and the State statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But, this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that

it has made no other requirement inconsistent with the State legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power."

The same test was rejected in *Oregon-Washington R. R. Co. v. Washington*, 270 U. S. 87 on pages 101-102, in the following language:

"The act we are considering is very different. It makes no reference whatever to cooperation with State authorities.

* * * * * *

"It follows that, pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the State action. Such construction as that can not be given to the Federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, State action is illegal and unwarranted."

The "compliance-defiance" test was rejected in *Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 404, which

was a suit to recover damages under Sections 9985, 9990, Revised Statutes of Missouri, 1919, which read:

> "'It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person * * * in the transportation of goods * * * or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage with respect to such transportation * * *' Section 9990, among others things, makes the carrier liable to any person injured by a violation of the above quoted provision for three times the amount of damages sustained."

Section 3 of the Interstate Commerce Act reads:

> "'That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or for any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The State statute in effect duplicated the right of action provided by the Federal law.

The court said:

> *"It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. * * * The State law has no*

application to the furnishing of cars to shippers for the transportation of freight in interstate commerce"
Missouri Pacific R. R. Co. v. Stroud, 267 U. S. 408.

The "compliance-defiance" test is merely an illustration of extreme cases, in which it is self-evident that a State enactment cannot stand because of its irreconcilable conflict with a Federal law. But there are many instances in which the owner of property in interstate commerce might comply with both regulations—cases in which compliance with one would not be defiance of the other—in which the Supreme Court of the United States has declined to subject the article in interstate commerce to *double regulation*.

Take the steamboat case, for instance (*Sinnot v. Davenport*, 63 U. S. 227): There the owner of the boat might well have filed the information in the Probate Office at Mobile, as the State law required, as well as with the collectors as the Federal law required. The case, as we understand it, turns on the proposition that Congress had legislated on the "very subject" which the State act undertook to regulate.

The regulation of interstate commerce is so intimately blended and intertwined with responsibilities of the National Government that where it acts, and the State also acts on the same subject, the Act of Congress is supreme and the law of the State, though enacted in the exercise of powers not controverted, must yield to it, and where the Federal Government in the exercise of its superior authority in this field has enacted a complete scheme of regulation and has therein provided a

standard for packing stock butter the State cannot conflict or interfere with, curtail or complement Federal law or enforce additional or auxiliary regulations. This contention is supported by the late case of *Hines v. Davidowitz*, 61 Sup. Ct. Rep. 399-403, where the rule was applied with reference to legislation affecting aliens. The power of Congress to regulate interstate commerce is certainly as broad as its power to legislate with respect to aliens.

In *Truax v. Raich*, 239 U. S. 33-42, Raich, an alien, brought an action against Truax and others to restrain the enforcement of a state statute requiring employers of more than five workers to employ not less than eighty per cent qualified electors or native born citizens. In declaring the statute unconstitutional the Court said:

> "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713. The assertion *of an* authority to deny aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."

This case seems to support the proposition that since Congress prescribed a standard for materials in interstate commerce used in the manufacture of renovated butter, it is not permissible for the State or state officers to provide another standard, even though the standard so provided is identical with the standard provided by Congress.

The Renovated Butter Act is plainly a health measure. The revenue feature is incidental. Any contention that the Renovated Butter Act is a revenue measure and not intended as a regulation of commerce ignores a material part of the title of the Act which is "and to regulate the manufacture and sale of certain dairy products." It ignores Section 2325 I. R. C. which authorizes and requires the Secretary of Agriculture to cause a rigid sanitary inspection to be made of the materials going into the manufacture of renovated butter.

Is a rigid sanitary inspection a revenue measure?

The contention also ignores Regulations 4, Section 1. Regulation 1, Sections 1 and 2 which require rigid sanitary inspection to be made of materials going into the manufacture of process or renovated butter and provide how the samples shall be drawn in order to determine whether or not materials used in the manufacture of renovated butter are deleterious to health or unwholesome in the finished product.

The contention also ignores *United States vs. Bohl*, 125 Fed. 625, where it was said:

> *"Other provisions of the (Renovated Butter) Act in question may gain their efficacy from the taxing clause of the Constitution, but Section 5 goes to the commerce clause as the fountain whence its vigor springs."* (Italics supplied.)

Section 5 referred to in the preceding quotation is the section in the act requiring the Secretary of Agriculture to cause a rigid sanitary inspection to be made of the

materials going into the manufacture of renovated butter. It is now Section 2325, I. R. C.

CONCLUSION

Congress says material to be used in the manufacture of renovated butter may move in interstate commerce as long as it is not unwholesome or deleterious to health *in the finished product.* And the U. S. Secretary of Agriculture will determine that.

The respondents say, No! It shall not move, even though not unwholesome or deleterious to health in the finished product, if it is sub-standard *by our standard*—and we will determine that.

It is respectfully submitted that the judgment and decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed and the cause remanded.

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APPENDIX

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUTES

FEDERAL STATUTES

I. R. C. Sec. 2320-2327,
USCA, Title 26, Sections 990-996:
"Sec. 990. DEFINITIONS.

"(a) BUTTER. For the purpose of this chapter and sections 1366, and 1367, the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

"(b) ADULTERATED BUTTER. 'Adulterated butter' is defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat, with which there is mixed any substance foreign to butter as defined in subsection (a), with intent or effect of cheapening in cost the product of any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.

"(c) PROCESS OR RENOVATED BUTTER. 'Process butter' or 'revonated butter' is defined to mean butter which has been subjected to any process by which it is melted, clarified or refined and made to resemble genuine butter, always excepting 'adulterated butter' as defined by subsection (b).

"Sec. 991. TAX.

"(a) RATE—(1) ADULTERATED BUTTER. Upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be as-

sessed and collected a tax of 10 cents per pound, and any fractional part of a pound shall be taxed as a pound. (May 9, 1902, c.)

"(2) PROCESS OR RENOVATED BUTTED. Upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of 1 cent per pound, and any fractional part of a pound shall be taxed as a pound.

"(b) BY WHOM PAID. The tax to be levied by subsection (a) shall be paid by the manufacturer.

"(c) HOW PAID—(1) STAMPS. The tax to be levied by subsection (a) shall be represented by coupon stamps.

"Sec. 992. MANUFACTURERS.

"(a) DEFINITION. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof.

"(b) PACKING, STAMPING, AND SELLING REQUIREMENTS—(1) ADULTERATED BUTTER. All adulterated butter shall be packed by the manufacturer thereof in firkins, tubs, or other wooden, tin-plate, or paper packages not before used for that purpose, containing, or encased in a manufacturer's package made from any of such materials of, not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, and all sales made by manufacturers of adulterated butter shall be in original, stamped packages. Every manufacturer of adulterated butter shall securely affix, by pasting, on each package containing adulterated butter manufactured by him a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words:

"'Notice.—That the manufacturer of the adulterated

butter herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases.'

"(c) BOOKS AND RETURNS. Every manufacturer of process or renovated butter or adulterated butter shall file with the collector of the district in which his manufactory is located such notices and inventories, shall keep such books and render such returns of material and products, and conduct his business under such surveillance of officers and agents as the Commissioner, with the approval of the Secretary, may by regulation require.

"(d) FACTORY NUMBER AND SIGNS. Every manufacturer of process or renovated butter or adulterated butter shall put up such signs and affix such number to his factory as the Commissioner, with the approval of the Secretary, may by regulation require.

"(e) BONDS. Every manufacturer of process or renovated butter shall file with the collector of the district in which his manufactory is located such bonds as the Commissioner, with the approval of the Secretary, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector and in a penal sum of not less than $500; and the sum of said bond may be increased from time to time and additional securities required at the discretion of the collector or under instructions of the Commissioner.

"SEC. 993. DEALERS IN ADULTERATED BUTTER.

"(a) DEALER DEFINED. Every person who sells adulterated butter shall be regarded as a dealer in adulterated butter.

"(b) RETAIL DEALER DEFINED. Every per-

son who sells adulterated butter in less quantities than ten pounds at one time shall be regarded as a retail dealer in adulterated butter.

"(c) SELLING REQUIREMENTS. Dealers in adulterated butter must sell only original or from original stamped packages, and when such original stamped packages are broken the adulterated butter sold from same shall be placed in suitable wooden, tinplate, or paper packages, which shall be marked and branded as the Commissioner, with the approval of the Secretary, shall prescribe.

"Sec. 994. BOOKS AND RETURNS OF WHOLESALE DEALERS IN ADULTERATED AND PROCESS OR RENOVATED BUTTER. Wholesale dealers in process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner, with the approval of the Secretary, may, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent.

"Sec. 995. INSPECTION, MANUFACTURE, STORAGE, AND MARKING OF PROCESS OR RENOVATED BUTTER.

"The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of

Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 996(c) and 997(b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same.

"Sec. 996. PENALTIES.

"(a) ADULTERATED BUTTER—(1) FALSE BRANDING; SALE, PACKING, OR STAMPING IN VIOLATION OF LAW. Every person who knowingly sells or offers for sale, or delivers or offers to deliver any adulterated butter in any form than in new wooden or paper packages as described in subsection (c) of section 993, or who packs in any package any adulterated butter in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than $1,000 and be imprisoned not more than two years.

"(2) OMISSION OR REMOVAL OF LABEL. Every manufacturer of adulterated butter who neglects to affix the label required under paragraph (1) of subsection (b) of section 992 to any package containing adulterated butter made by him, or sold or offered for sale for or by him, and every person who removes any such label so affixed from any such package shall be

fined $50 for each package in respect to which such offense is committed.

"(b) FAILURE OF WHOLESALE DEALERS TO KEEP OR PERMIT INSPECTION OF BOOKS, OR TO RENDER RETURNS. Any person who willfully violates any of the provisions of section 994 shall for each such offense be fined not less than $50 and not exceeding $500, and be imprisoned not less than thirty days nor more than six months.

"(c) FAILURE TO COMPLY WITH PROVISIONS RELATING TO THE MANUFACTURE, STORAGE, AND MARKING OF PROCESS OR RENOVATED BUTTER. Any person, firm or corporation violating any of the provisions of section 995 shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $50 nor more than $500 or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

B. D. I. Order No. 1—Revised

Issued December 24, 1936

UNITED STATES DEPARTMENT OF AGRICULTURE

BUREAU OF DAIRY INDUSTRY

REGULATIONS FOR CARRYING INTO EFFECT THE PROCESS OR RENOVATED BUTTER ACT.

INTRODUCTION

Under authority conferred upon the Secretary of Agriculture by the act of Congress approved May 9, 1902, entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any state, or territory, or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine approved August 2, 1886'" (32 Stat. 193-197; U. S. C., title 26, sec. 990-997); and by the act of Congress approved August 10, 1912, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913" (37 Stat. 273); the following regulations are made and are hereby promulgated, which for purposes of identification are designated B. D. I. Order No. 1—Revised, superseding S. R. A. 1—Bureau Dairying, issued April, 1925; and B. D. Order 1, issued February 14, 1925; which are hereby revoked.

HENRY A. WALLACE,
Secretary of Agriculture.

Washington, D. C., December 24, 1936.

Regulation 1.—Short Title of Act

For the purpose of these regulations the act entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An Act Defining Butter,' also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886," approved May 9, 1902 (32 Stat. 193-199; U. S. C., title 26, sec. 990-997, as amended by the act of August 10, 1912 (37 Stat. 273, U. S. C., title 26, sec. 997 (c), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913," shall be known and referred to as the Process or Renovated Butter Act. The Chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary, with the administration of these regulations.

Regulation 2.—Definitions

For the purpose of these regulations the following words, phrases, names, and terms shall be construed, respectively, to mean:

Section 1. *The Meat Inspection Act.*—The act of June 30, 1906, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seven" (34 Stat. 674-679) as reenacted by act of March 4, 1907 (34 Stat. 1260-1265; U. S. C., title 21, secs. 71 to 94), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June

thirtieth, nineteen hundred and eight," the sanitary provisions of which are made applicable to renovated-butter factories by act of Aug. 10, 1912 (37 Stat. 273; U. S. C., titles 26, sec. 997 (c), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913."

Sec. 2. *Department.*—The United States Department of Agriculture.

Sec. 3. *Bureau.*—The Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 4. *Chief of Bureau.*—The administrative head of the Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 5. *Inspector.*—Any Department officer or employee authorized to perform any duties in connection with the administration of these regulations.

Sec. 6. *Person.*—Natural persons, individuals, firms, partnerships, corporations, companies, societies, and associations, and agent, broker, officer, employee, or member thereof. This term shall import both the plural and and the singular as the case may be.

Sec. 7. *Butter.*—The food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Sec. 8. *Par.* 1.—*Process or renovated butter.*—Butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting adulterated butter as defined in section 4 of the act of May 9, 1902 (32 Stat. 195).

Par. 2. Process or renovated butter must contain at least 80 per cent by weight of milk fat.

Par. 3. The term "process butter" and "renovated butter" are used synonymously and it is immaterial whether a manufacturer designates the product "process butter" or "renovated butter."

Regulation 3. — Sanitation and Sanitary Inspection of Process or Renovated Butter Factories

Section 1. For the purpose of effectively administering the Process or Renovated Butter Act, rigid sanitary inspections will be made at such times and as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market.

Sec. 2. Inspectors shall have access at all times by day or night to every part of any process or renovated butter factory or storehouse.

Sec. 3. Process or renovated butter factories or storehouses where process or renovated butter is manufactured, packed, prepared, or handled shall be maintained in a sanitary condition, and to this end the requirements of sections 4 to 12 of this regulation shall be complied with.

Sec. 4. Factories where process or renovated butter is manufactured, packed, or prepared for market shall be suitably lighted, screened, and ventilated in order that sanitary conditions may be maintained. Such factories shall be supplied with proper and sufficient drainage, having proper traps or other approved sewer connections. Rooms shall be kept reasonably free from steam and other vapors by heating or proper ventilation, and all work in such factories shall be performed in a sanitary manner.

Sec. 5. All floors, ceilings, walls, pillars, partitions, platforms, stairways, etc., shall be kept in a sanitary condition and when necessary shall be scraped, washed, painted, or otherwise treated as required. Where floors or other parts of the building, or tables or other parts of the equipment, are so old or in such poor condition that they cannot readily be made sanitary, they shall be removed and replaced with suitable material. Walks,

platforms, and approaches leading into factories shall be kept clean.

Sec. 6. All churns, melting tanks, workers, cans, vats, blowing tanks, settling tanks, trucks, trays and other receptacles, chutes, platforms, racks, tables, and all utensils, machinery, and other equipment used in preparing, moving, cutting, chopping, and otherwise handling the materials used in the manufacture of process or renovated butter, and in all processes of manufacturing of process or renovated butter or its preparation for market, shall be kept in a sanitary condition.

Sec. 7. All factories in which milk, cream, or mixtures containing milk or cream are pumped or conducted through pipes shall be equipped with sanitary pumps, pipes, and fittings. Pumps shall be so constructed that all parts coming in contact with milk, cream, or mixtures containing milk or cream shall be made of noncorrosive metal, or shall be suitably nickled, tinned, or coated with other approved metal, and such parts shall be accessible for cleaning. Pipes shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and fittings shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and shall be of such design that no pockets or recesses occur on the inside between the pipes and fittings: *Provided, however,* That open conductors having smooth outer and inner surfaces coated with nickel, tin, or other approved metal may be used in place of pipe. All pumps, fittings, and conductors shall be kept in a sanitary condition.

Sec. 8. Managers of process or renovated butter factories shall require employees to be cleanly. Aprons, smocks, and other outer clothing worn by employees who handle or in any way come in contact with the process or renovated butter or any ingredient entering into the manufacture of same shall be of material that can be made sanitary by washing, and only clean garments

shall be worn. All persons who handle process or renovated butter or any material entering into the manufacture of same shall be required to keep their hands clean, and they shall be required also to pay particular attention to the cleanliness of their boots and shoes.

Sec. 9. No person affected with tuberculosis or other communicable disease shall be employed in any factory where process or renovated butter is manufactured, and any employees who may be suspected of being so affected shall be reported by the inspector to the manager of the factory and to the Chief of Bureau.

Sec. 10. All water closets, toilet rooms, and dressing rooms shall be entirely separated from the compartments in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled; and where such rooms open into compartments in which process or renovated butter is handled they shall be provided with properly ventilated vestibules and automatically closing doors. They shall be conveniently located, sufficient in number, ample in size, and fitted with modern lavatory accommodations including toilet paper, soap, running hot and cold water, etc., and shall be properly lighted, suitably ventilated, and kept clean and sanitary.

Sec. 11. The factory in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled shall be kept free from odors coming from poultry rooms, egg rooms, toilet rooms, catch basins, or any other objectionable source, and shall be kept free from flies and other vermin; and all rooms or compartments shall be provided with cuspidors so designed as to prevent them from being upset, and made of such material and construction as to be readily disinfected, and employees who expectorate shall be required to use them.

Regulation 4.—Sanitation and Sanitary Inspection of Products of and Material From Which Process or Renovated Butter is Manufactured

Section 1. "Rigid" sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.

Sec. 2. Due care must be taken to prevent process or renovated butter, in any stage of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter.

Sec. 3. Only good, clean, and wholesome water and ice shall be used in the preparation and manufacture of process or renovated butter and, whenever there is any doubt regarding the purity of the water supply, the facts shall be reported to the Chief of Bureau.

Sec. 4. Air used in blowing or aerating the oil during the process of manufacture shall be pure and clean, and shall be taken from the outside of the building; and in order to prevent the use of air which is contaminated with dust, smoke, objectionable odors, etc., some approved method of purification, such as washing or filtering through cotton, shall be provided.

Sec. 5. In manufacturing process or renovated butter all cream, milk or skim milk used must be pasteurized.

Sec. 6. All milk, skim milk, dried milk, dried skim milk, cream, and analogous substances used in the making of process or renovated butter shall be kept, stored, and handled in a sanitary manner in accordance with accepted dairy practices.

Sec. 7. All other materials including salt and butter color entering into the manufacture of process or renovated butter shall also be kept, stored, and handled in a sanitary manner.

Sec. 8. All cartons, parchment wrappers, liners, packages, tubs, cans, tins, or other containers used for packing process or renovated butter shall be stored, kept, and handled in a sanitary manner.

Regulation 5.—The Marking, Labeling and Branding of Process or Renovated Butter

Section 1. (a) Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State. and the net weight, in the following manner:

PROCESS BUTTER
Factory No. 2, 2d Dist. New York
Net Weight, 60 lbs.

(b) The legend "Process Butter" or "Renovated Butter" shall be in boldface gothic letters not less than three-quarters of an inch square and the other words and figures not less than half an inch square. The color of the legend shall be in strong contrast to that of the package.

Sec. 2. The wrappers, cartons, or other containers in which prints or rolls are placed shall be branded with the legend "Process Butter" or "Renovated Butter" in boldface gothic letters, not less than three-eights of an inch square. Such legend shall form a strong contrast to the color of the wrapper or container. No other marks shall be made on the side of wrapper or container on which the legend is placed.

Sec. 3. Each package must show the manufacturer's name and address or the factory number, district, and State, and bear a plain and conspicuous statement of the net weight of contents. Such wrappers, cartons, or other containers shall bear no pictorial or other representation which may create the impression that the article is butter as defined by the act of Congress of March 4, 1923.

Sec. 4. The top surface of solid-packed goods shall be imprinted with the legend "Process Butter" or "Renovated Butter" in plain gothic letters not less than half an inch square, and impressed at least an eighth of an inch deep. Prints and rolls shall be similarly impressed with letters not less than three-eighths of an inch square. The surface impression may be omitted from prints and rolls of less than a pound unit weight, provided there is compliance with all other requirements.

Sec. 5. With the exception of shipping marks, any marks, brands, or labels, other than those prescribed by these regulations, shall be approved by the Secretary of Agriculture before they are used on packages of process or renovated butter.

Sec. 6. Approved copies of all marks, brands, or labels shall be retained at the manufacturers' registered place of business, available for inspection by an inspector.

Sec. 7. Every manufacturer of process or renovated butter who fails to brand the product and the containers in which it is packed is punishable by a fine of not less than $50 nor more than $500 or by imprisonment for not less than 1 month nor more than 6 months, or both. Every person who removes any such brands from any package of process or renovated butter is punishable by a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both, as provided in section 4, act of March 3, 1891, made applicable by section 5, act of May 9, 1902.

Sec. 8. Misbranding any article of food intended for interstate commerce, or manufactured or offered for sale in any Territory of the United States or the District of Columbia; is prohibited. That for the purposes of the Food and Drugs Act an article shall also be deemed to be misbranded in the case of food—

(1) If it be an imitation of, or offered for sale under the distinctive name of another article;

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purports to be a foreign product when not so, or if the contents of the package, as originally put up, shall have been removed in whole or in part and other contents shall have been placed in such package;

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; or

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

No provision of these regulations shall be construed so as to relieve any person from compliance with the Federal Food and Drugs Act.

Sec. 9. Inspectors of the Department of Agriculture, appointed for the purpose by the Secretary of Agriculture, are authorized to enter all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market for the pupose of examination or inspection authorized by this act.

Sec. 10. Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Chief of Bureau on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or reno-

vated butter produced. The sanitary provisions of the Meat Inspection Act shall apply to the sanitary inspection of process or renovated butter factories. (See act of Aug. 10, 1912 (37 Stat., 273.)

Sec. 11. Process or renovated butter containing any filthy decomposed, or putried animal or vegetable substance shall be deemed adulterated under the Foods and Drugs Act.

Sec. 12. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof.

Sec. 13. Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use and may be covered with cloth, jute, or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter," in boldface gothic letters not less than an inch square, and the words "For Export Only" on the line beneath, in similar letters not less than three-eighths of an inch square.

Sec. 14. Process of renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

(The foregoing secs. 1 to 14, have been promulgated by the Commissioner of Internal Revenue and approved

by the Secretary of the Treasury and the Secretary of Agriculture.)

Sec. 15. All marks, brands, or labels, within the meaning of these regulations shall include printed, lithographed, or embossed labels, stickers, seals, wrappers, and receptacles.

Sec. 16. Marks, brands, or labels to be affixed to process or renovated butter intended for export shall in all cases be printed in the English language, but they may also be literally translated into foreign languages.

Sec. 17. No mark, brand, stencil, sticker, label, or seal to be affixed to any tin, carton, wrapper, or other container in which process or renovated butter is placed shall be used until it is approved in its final form by the Chief of Bureau. Triplicates of new trade labels in the form of sketches, proofs, or photographic copies shall be transmitted direct or through inspectors to the Chief of Bureau for approval, and finished trade labels, cartons, or wrappers shall not be prepared in advance of such approval of sketches. After such labels, cartons, or wrappers have been printed, lithographed, or embossed in accordance with the approved sketches or proofs three each of such cartons, labels or wrappers shall be submitted direct or through the inspectors for final approval and filing. Copies of approved labels, cartons, or wrappers shall be kept on file and available for examination by inspectors upon request.

Sec. 18. Trade labels which bear any false or deceptive names shall not be used.

Regulation 6—Reports

Section 1. Each process or renovated butter factory shall furnish to authorized inspectors accurate information as to all matters required in making their reports.

Regulation 7.—Process or Renovated Butter Intended for or in the Course of Interstate Commerce or for Export

Section 1. To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, a sample of such butter shall be taken.

Sec. 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one *churning*, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter.

Sec. 3. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis.

Sec. 4. If such butter is found upon such examination and such chemical analysis to be deleterious to health or unwholesome, and such butter is intended for exportation or shipment into other States, or is in the course of exportation, or in the course of such shipment, the Secretary shall confiscate the same to prevent its use for food purposes. The Secretary may release such butter to its owner for industrial use, upon such conditions as he deems necessary to prevent its use for food purposes.

Sec. 5. Any butter suspected of being process or renovated, or adulterated, wherever found will be sampled as herein provided. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis, to-

gether with a statement outlining the circumstances of the collection of sample.

Sec. 6. All process or renovated butter intended for exportation or in the course of exportation must be marked as provided in these regulations.

Sec. 7. All process or renovated butter consigned to a foreign country must be inspected and duly certified before delivery to any vessel, carrier, or transportation company. Officers and agents of vessels and of transportation companies transporting merchandise consigned to foreign countries shall not accept process or renovated butter for transportation and export unless accompanied by an official inspection certificate issued pursuant to these regulations, properly dated and countersigned by an inspector. No vessel having on board any process or renovated butter for exportation from any port of the United States will be cleared until the owner or shipper shall obtain an inspection certificate as required by these regulations, attesting to the purity, legal composition, and suitability for export of such process or renovated butter.

Sec. 8. Owners or shippers of process or renovated butter intended for export shall apply for inspection in writing to the Chief of Bureau. The said application shall state the location or place of business of the owner or shipper and the usual place or places where the process or renovated butter may be inspected, the place or places from which it is directly transported to the exporting vessel or transportation company, and the probable frequency of exports.

Sec. 9. The Chief of Bureau shall, upon receipt of such application, designate an inspector for the service required.

Sec. 10. The owner or shipper will notify the inspector of every export shipment to be made by him, at least 12 hours in advance, and shall briefly describe the location, form of package, and quantity of process or ren-

ovated butter to be inspected. The inspector will not be required to make inspections at two or more places distantly removed from one another if the materials are to be included in one shipment, but the inspection of an entire shipment may be made at the pier or place of loading for export.

Sec. 11. Inspections of process or renovated butter for export may be made at the place of manufacture and such inspections may also be made at the place of exportation, if inspection has not previously been made, or, in the opinion of the inspector, a reinspection is necessary. The certificate for export will ordinarily be given by the inspector at the factory or at the place where the customs papers for export are prepared.

Sec. 12. The inspector will examine the merchandise specified with the least possible delay. And it will be the duty of inspectors to examine any process or renovated butter for export, upon the application, formal or informal, of transportation companies or their agents, or any such process or renovated butter about to be loaded for export, whether or not notice thereof has been received.

Sec. 13. Inspectors may make such examination of the process or renovated butter for export in such detail as in their judgment is deemed necessary to show that such butter complies with the law and the regulations. They may take samples of the same and detain the shipment, if deemed necessary, until chemical tests of samples are made. The presence, intact and properly affixed thereon, of the stamps, marks, and labels on a lot of process or renovated butter offered for export from a registered factory or factories may be accepted by an inspector as evidence of purity and of manufacture in accordance with law and these regulations, and the prescribed export certificate may then be executed by the inspector. Additional marks or labels may, however, be required by the inspector for the

more complete identification of the process or renovated butter to be exported.

Sec. 14. The inspector shall complete, countersign, and issue a certificate of export. Such certificate shall be dated, shall show the names of the exporter and consignee, and shall describe the lot of process or renovated butter to which it applies. Such description shall include the State, revenue district, and factory number of every factory represented in the lot, and the number of packages from each factory, their respective weights and the shipping marks. Such certificate shall state that the process or renovated butter in question is the product of a registered factory, of legal composition, and suitable for export. Certificates shall be numbered serially and rendered in triplicate.

Sec. 15. Only one certificate shall be issued for each consignment unless otherwise directed by the Chief of Bureau.

Sec. 16. The original certificate shall be delivered to the shipper and shall be used only for the purpose of effecting the transportation and delivery of the consignment.

Sec. 17. The duplicate of the certificate shall be delivered to the shipper and by him to the agent of the railroad or other carrier which transports the consignment from the United States otherwise than by water, or to the chief officer of the vessel on which the export shipment is made and without which no clearance shall be given to any vessel having aboard any process or renovated butter and shall be used only by these agencies and for the purpose of effecting the transportation of the consignment certified. The chief officer of the vessel shall file such duplicate with the customs officer at the time of filing the master's manifest or the supplemental manifest.

Sec. 18. The triplicate of the certificate shall be retained by the inspector issuing the same.

Sec. 19. Under no circumstances shall the original or the triplicate of any certificate be used for the purpose for which it is prescribed by paragraph 17 hereof that the duplicate shall be used.

Sec. 20. No person operating any steam or sailing vessel, and no railroad or other carrier, shall receive for transportation to any foreign country any process or renovated butter, except ship stores and small quantities exclusively for the personal use of the consignee and not for sale or distribution, unless and until a certificate of inspection covering the same has been issued and delivered as provided in these regulations.

Sec. 21. All special requirements, if any, of foreign countries in regard to export certificates for process or renovated butter shall be complied with in respect to all certificates issued, provided such requirements are not in violation of the laws of this country or the rules and regulations promulgated under such laws.

SECTIONS OF ALABAMA AGRICULTURAL CODE OF 1927

37. POSSESSION: SALE AND DELIVERY OF PROHIBITED ARTICLES.—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article.

38. DEFINITION OF WORDS AND TERMS. —The word "article" when referring to food or drugs, is used in the broad and comprehensive sense and has reference to the food product or the drug product in question. The term "food" as used herein shall include all articles of food, drink, confectionery, or condiment, whether simple, mixed or compound, used or intended for use by man or domestic animals. The term "drug"

as used herein shall include all medicines and preparations recognized in the U. S. Pharmacopoeia or National Formulary for internal or external use and any substance of mixture of substances to be used for the cure, mitigation or preventation of disease in man or domestic animals. The words "standard of purity or quality" herein used shall refer to and include the standards of purity for food products promulgated by the State Board of Agriculture and statutes of this State.

39. ADULTERATION OF FOOD.—An article shall be deemed adulterated in the case of food: First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, stained, or otherwise treated in a manner whereby damage or inferiority is concealed, or in a manner whereby the appearance of said Article is improved; provided this shall not apply to the precoloring or processing of fruits where such precoloring or processing does not conceal damage or inferiority. Fifth. If it contains any poisonous or delterious ingredient which may render such article injurious to health; Provided, that when in the preparation of food products for shipment they are preserved by an external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Article shall be construed as applying only when said products are ready for consumption. Sixth. If it consists in whole or in part of a filthy. decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whe-

ther manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Seventh. If in the course of its preparation of manufacture an ingredient of inferior food value has been substituted in whole or in part for an ingredient of greater food value. Eighth. If it does not conform to the standard of purity or quality established for the article.

71. RENOVATED BUTTER.—No person shall sell in this State any butter that is produced by taking original packing stock butter, or other butter, or both, and melting the same so that the butter fat can be drawn off or extracted, then mixing the said butter fat with skimmed milk, or milk, or cream, or other milk product, and re-churning or re-working the said mixture, or that produced by any process that is commonly known as boiled, process or renovated butter, unless the words "renovated butter" shall be plainly branded with Gothic or bold faced letters at least three-fourths of an inch in height on the top and sides of each tub, or box, or pail, or other kind of case, or package, or on the wrapper of prints or rolls in which it is put up. If such butter is exposed for sale uncovered or not in a case or package, a placard containing the labels so printed shall be attached to the mass of butter in such manner as to easily be seen and read by the purchaser. The branding or marking of all packages shall be in the English language, and in a conspicuous place so as to be easily seen and read by the purchaser.

72. COMMISSIONER CHARGED WITH ENFORCEMENT.—The Commissioner and his duly authorized agents shall be charged with the proper enforcement of all the provisions of this Article.

Section 217. AS AMENDED. That Section 217 of Article Twenty-three of the 'Agricultural Code of

Alabama,' of 1927, be and the same is hereby amended so as to read as follows: Section 217. Suspension of Sale of Article.—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept, offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law.' If he shall find that the same does not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placing of such product or article in such condition as will meet the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the succeeding Sections of this Article. Provided in case the owner of such product or article denies by written notice to the Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who

moves, transports, sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six months or both, provided that such product or article may be moved, transported or otherwise disposed of by and in compliance with written order by the Commissioner.

Sec. 3 pp. 1103 and 1104 of the Acts of 1935.

218. PROCEEDING TO CONDEMN SEIZED ARTICLE.—Any fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn comlpaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the Court issuing the

writ; such Court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendered by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of

adutleration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this Article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof.

219. REPORT OF VIOLATIONS TO SOLICITOR. If it shall appear from examination or analysis of fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seed, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any articles of food or drugs that any

of the provisions of this Article have been violated, the Commissioner shall certify or cause to be certified the facts to the county or State solicitor, with a copy of the results of the analysis or examination, and said county or State solicitor upon receipt of this information shall cause appropriate proceedings to be instituted in the proper Court, for the imposition of fines and penalties herein provided.